In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 679

JAMES ROBERT PALMER AND LENORE PALMER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17-27) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1955 (Pet. 27-28). On January 13, 1956, by order of Mr. Justice Clark, the time in which to file a petition for a writ of certiorari was extended to February 11, 1956. The

petition was filed on February 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for use of the mails to defraud, it was proper to allow amendment of the information during trial to correct errors as to the date and amount of a fraudulent mortgage.

2. Whether there was prejudicial error in the admission of evidence.

3. Whether the trial court's instruction to the jury on reasonable doubt was proper.

4. Whether consecutive sentences could properly be imposed on counts charging separate mailings in furtherance of separate schemes to defraud.

STATEMENT

Count 1 of a five count information filed in the United States District Court for the District of Colorado charged petitioners, James Robert Palmer and Lenore Palmer, with using the mails to defraud in violation of 18 U.S.C. 1341 (R. 4-5). James Robert Palmer was charged alone in Counts 2, 3 and 4 with using the mails to defraud in the sale of securities in violation of 15 U.S.C. 77q (a)(1) (R. 5-11), and in Count 5 with another violation of 18 U.S.C. 1341 (R. 11-12). Upon conviction, Mrs. Palmer was placed on probation for a period of three years (R. 17-18). Mr. Palmer was sentenced to three years

imprisonment on each count, the sentence on Count 2 to run consecutively to that imposed on Count 1 and the others to run concurrently with the sentences on Counts 1 or 2 (R. 16-17). On appeal, the judgments were affirmed (Pet. 27-28).

Count 1 related to the operation by both petitioners of an automobile business known as Ace Motors in Pueblo, Colorado (R. 4-5). Ace Motors entered into a floor plan mortgage agreement with a finance company, Denver Motor Finance (R. 75). By the terms of the agreement, Denver Motor Finance was to advance money to Ace Motors on the security of new cars. When Ace Motors sold a car so encumbered, it was to assign the note and mortgage which it received from the purchaser to the finance company which in turn would release the car. (R. 76, 81, 89.)

On August 22, 1951, Ace Motors, with Mrs. Palmer signing for the company, caused a fraudulent "Installment Sale Contract-Note and Mortgage" to be assigned and mailed to the finance company (R. 89, 189, 191). The mortgagor-buyer designated thereon, one James K. Morris, who purportedly executed the mortgage on August 1, 1951 (R. 189), was unknown to the post office authorities and to the state motor vehicle department (R. 128-129, 176). The car described had in fact been sold to a cash buyer (R. 102). At the trial the court allowed an amendment to show that the purported date of execution of the fraudulent mortgage was August 1, 1951, rather than October 1, 1951, as alleged originally, and that

the amount of the mortgage was $2,041.40 with installments of $113.41, rather than $1,730.00 with installments of $131.41 (R. 77-79).

A second such fabricated instrument was assigned and mailed to the finance company on October 4, 1951 (R. 89, 198-199). Mrs. Palmer's name by a former marriage, Anita Watkins, appeared thereon as the mortgagor-buyer (R. 129, 147). The car described in the instrument had been sold almost three months before the purported date of execution to a buyer who completed payment therefor from proceeds of a loan secured by an independently arranged chattel mortgage (R. 104, 105). The mailing of both mortgages was charged as one offense in Count 1 (R. 4-5).

The other counts against James Palmer alone related to Ace Finance, Inc., of Pueblo (R. 5-12), incorporated under the laws of Colorado in June 1951 (R. 29). Palmer was president and general manager of this corporation (R. 162). In December 1951 he ran a newspaper advertisement in the *Wichita Beacon,* Wichita, Kansas, which invited investment in Ace Finance, asserting that all accounts were guaranteed, licensed and bonded and that the corporation paid six per cent interest on savings (R. 27).

Palmer wrote (R. 32, 52-53) or personally called upon persons making inquiry (R. 34, 49, 54, 57, 61, 63), urging that they invest in the corporation. Palmer falsely represented that each investment was insured up to $10,000 (R. 34, 50, 62, 174) and was guaranteed by an agency of the federal gov-

ernment (R. 36); that the current dividend was six per cent (R. 34, 62, 63, 171); that the corporation carried a reserve of $25,000 to make refunds to investors who wanted their money back (R. 36, 175), was audited every three months by the "controller of currency of the State of Colorado" (R. 33, 174), and was entitled to use a small rubber stamp only because it was bonded for $75,000 (R. 49, 53, 171-172, 174). Palmer also falsely stated many times that various persons were investing or had invested in the preferred stock of the corporation (R. 35, 47, 51, 53, 64, 172). Only one of the persons contacted by Palmer responded with an investment; Wells M. Coleman of Russell, Kansas, turned over to Palmer checks totaling $6,000 (R. 37).

The mailing charged in Count 2 was a letter from the Ace Finance Company received by Mr. Coleman in reply to his inquiry; in this reply a number of false representations were made (R. 8, Ex. 7, R. 32).[1] The other counts charged letters to other interested persons (R. 9-12).

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[1]The letter was as follows:

"ACE FINANCE INCORPORATED
326 W. 8 St. Ph. 6400
Pueblo, Colorado

C. W. Coleman, Rt. 2 Russell, Kansas

Dear Mr. Coleman: In answer to your letter of January 10th, in regard to the Finance Company in our city, we wish to inform you that we will be glad to explain the deal thoroughly upon receipt of how much money you have to invest in preferred stock. Any Company that is licensed and bonded to do business in any city of the United States is guaranteed 100% by National Surety Bond to every Stock holder.

Today we have more than three thousand dollars worth of

ARGUMENT

1. Petitioners contend (Pet. 8-11) that the trial court improperly allowed an amendment of count 1 of the information to conform to the proof as to date and amount of the purported Morris mortgage (R. 79; *supra*, pp. 3-4). However, Rule 7(e) of the Federal Rules of Criminal Procedure permits an information to be amended at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Petitioners argue that, since it would have been impossible for them to have negotiated on August 22, 1951, a chattel mortgage executed on October 1, 1951, the allowance of the amendment resulted in the charging of a completely different offense (Pet. 9). But the two essential elements of the

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invested stock. Any money paid for preferred stock is returnable after 6 months by giving a thirty day written notice. All stock must be sold back to the Company. The company keeps this money in reserve to buy any loan standing in preferred stock. A person may draw 6% interest every six months.

We are audited by the controller of currency of the State of Colorado every three months and when you are licensed and bonded it is sound and safe. The writer will be glad to go over documented data on such matters. We do not want any investment under 25,000.00. We have some stock holders as high as 60,000.00.

If you are interested any further we will send documents or call on you in the near future, as he has other people near your town.

Yours truly,

/s/ J. R. PALMER,
ACE FINANCE INCORPORATED"

J.R.P/at

offense—the scheme to defraud and the use of the mails for the purpose of executing the fraudulent scheme—were set forth in the information as originally filed, and the amendment did not effect a change in these elements. The detailed description of the fictitious mortgage was not an essential element of the offense. See *Fredrick* v. *United States,* 163 F. 2d 536 (C.A. 9), certiorari denied, 332 U.S. 775; *United States* v. *Peach Mountain Coal Mining Company,* 161 F. 2d 476 (C.A. 2).

It is clear, too, that petitioners were not prejudiced by the amendment. The "legal impossibility" that a mortgage could be negotiated before it was executed, which petitioners stress, tends to negate any suggestion that the amendment could have taken them by surprise. The Morris mortgage was sufficiently described in the original information to apprise petitioners of what charge they would be called upon to meet. The name and address of the purported mortgagor, the description of the car, and the date of the assignment to the finance company were all correctly recited.

Moreover, the mailing of the second fraudulent mortgage, the details of which were correctly described, would itself support the convictions on count 1 (see *supra,* p. 4).

2. Petitioner James Palmer mistakenly asserts (Pet. 11-13) that the letter to Coleman which formed the basis of Count 2 (Ex. 7, R. 32), the letter from the Ace Finance Company purportedly bearing petitioner's signature, was improperly ad-

mitted in evidence because there was no proof as to who actually wrote the signature. The government was not required to prove that Palmer personally wrote, signed or posted the letter for mailing. As the court below pointed out (Pet. 23), it was sufficient to show that in carrying out the scheme to defraud he caused the letter to be mailed, and this fact, like any other, may be found from the circumstances. *Butler* v. *United States,* 53 F. 2d 800 (C.A. 10). The letter came from the Ace Finance Company, which was the means petitioner used for his fraudulent scheme, and the jury was plainly entitled to infer that he caused its use.[2] The evidence showed, moreover, that, when petitioner called upon Coleman at his home shortly after the mailing, he demonstrated his knowledge of this letter bearing his signature and his knowledge of its contents (R. 35). Upon cross-examination later, implicitly acknowledging his responsibility, Palmer apologized for having made the false representation in the letter that his company was audited by the "controller of currency" (R. 174).

Petitioner James Palmer also objects, on the ground of immateriality, to the admission of Exhibit 46 (R. 166), a letter written by one William Davis of Ace Finance, on April 23, 1952, addressed to a Mrs. Rainbolt in Mesa, Arizona, in reference

[2] The same answer applies to the complaint petitioner registers later (Pet. 14) against the admission of the letter to Coleman, purportedly signed by "C. P. Parker, Sec'y", congratulating Coleman on his investment in Ace Finance Company (Ex. 11, R. 39).

to her alleged ownership of Ace Finance stock delivered to her by Palmer in an apparent attempt to discharge a $15,000 indebtedness. The letter disputes the alleged assertion by Mrs. Rainbolt that she owned stock, decries her action in writing to bank officials and to the police about Palmer and the company, and admonishes her not to write such letters again under threat of company action. The court below, although deeming the letter immaterial, found its admission not prejudicial. *Rice* v. *United States,* 149 F. 2d 601 (C.A. 10).

There is much to be said for the materiality of this letter, not with regard to specific overt acts charged in the indictment, but to show the general scheme and artifice to defraud. Before its introduction in evidence, Palmer identified the signature of William Davis as that of a man who "worked with us for about 60 days" (R. 165). The letter referred to Palmer as an employee and manager of the company, although at the time, April 23, 1952, he was concededly president and general manager (R. 162, 167). The obvious purpose in writing the letter was to divert attention from the illegal practices then being engaged in by Palmer. It would have been perfectly reasonable for the jury to infer that he caused the letter to be mailed.

In any event, assuming error in the admission of this letter, the error was harmless. This was a very minor piece of evidence in a case in which fraud was overwhelmingly established.

3. In its charge to the jury, the court instructed (R. 181-182):

> The defendant in a criminal case is not required to prove his or her innocence. The burden is on the United States to prove his or her guilt of the offense charged and every material element thereof beyond a reasonable doubt. The defendant is presumed to be innocent of the charge until his or her guilt is established by legal evidence beyond a reasonable doubt and in the event you have a reasonable doubt upon the whole case as to either of the defendants being proven to be guilty, then it will be your duty to resolve that doubt in his or her favor and acquit him or her.

Petitioners' counsel, in reply to a specific inquiry from the judge before the jury retired, stated that there were no objections (R. 187). It is now contended on behalf of James Palmer (Pet. 15-16) that this charge was misleading in that it permitted the jury to find guilt "in a general sense" and not on the specific charges. However, the judge, after instructing on the presumption of innocence and reasonable doubt and detailing at some length the elements of each offense, ended his instruction as follows (R. 186):

> As to the defendant James Robert Palmer it is necessary for you to determine his guilt or innocence upon *each of the five counts* and the necessary forms have been prepared for

> your consideration in connection with him. The cases against each defendant should be considered separately as they are entitled to separate consideration by the jury. [Emphasis added.]

Thus, the charge as a whole correctly stated the applicable principles. And the absence of objection precludes petitioners from raising their contrary view on appeal. Rule 30, Federal Rules of Criminal Procedure; *Berenbeim* v. *United States,* 164 F. 2d 679 (C.A. 10); *Bartlett* v. *United States,* 166 F. 2d 928 (C.A. 10); *Thayer* v. *United States,* 168 F. 2d 247 (C.A. 10).

4. Palmer's further contention (Pet. 3) that his sentences on Counts 2 through 5 impose invalid multiple penalties is without merit. It is settled that each separate use of the mails in the execution of a scheme to defraud constitutes a separate offense. *Badders* v. *United States,* 240 U.S. 391; *Mitchell* v. *United States,* 142 F. 2d 480 (C.A. 10). Moreover, in this case, the consecutive sentences apply to two separate schemes.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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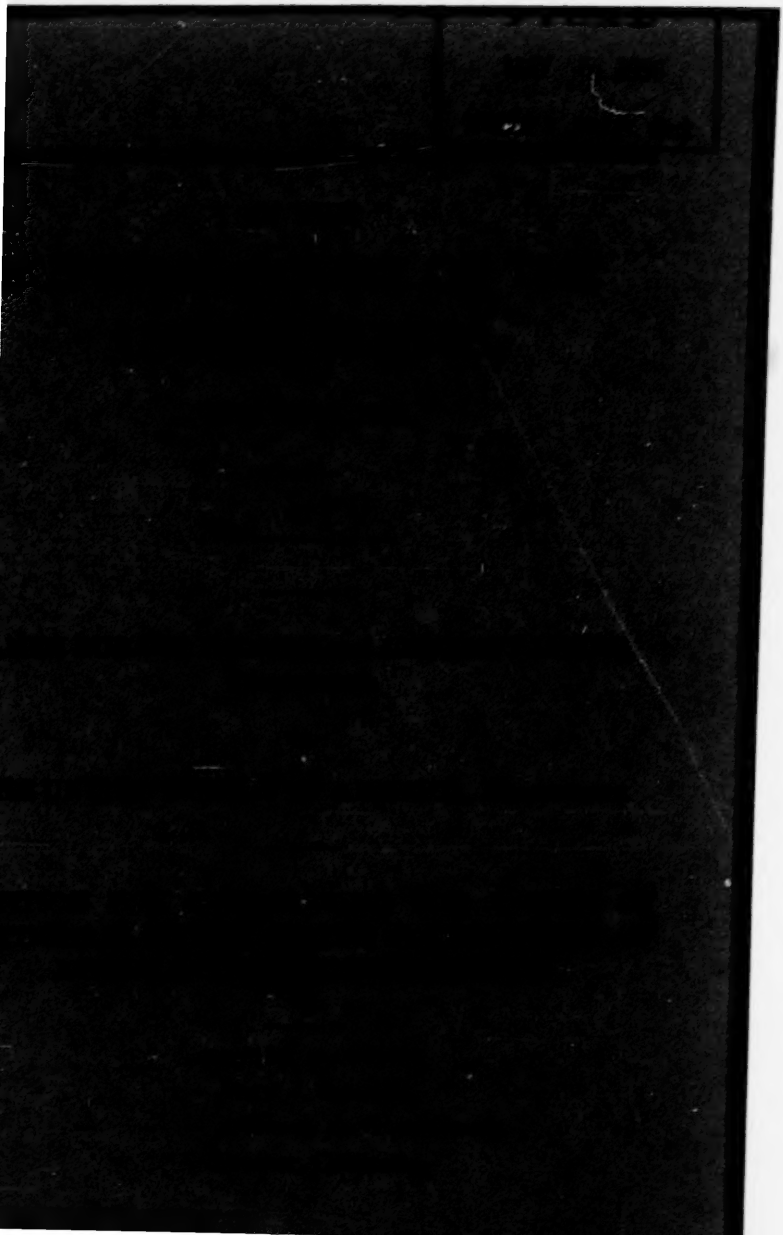

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